

Application of the Virginia Fertility Center, L.L.C.

Findings of Fact

On October 16, 1997, the Virginia Fertility Center, L.L.C., (the "Center") submitted an application for an advisory opinion asking whether the physician owners of the Center may refer patients to the Center for assisted reproductive services, some of which will not be directly performed by these physicians. The proposal provides that the physician will remain involved in the care of the patient while providing a majority of the physician services. A second inquiry is whether the physician owners may refer patients to the Center if the referral is made to another member of his group practice. A third inquiry is whether the use of space in the Center on at least a weekly basis constitutes the physician's "office practice" as that term is defined in the Practitioner Self Referral Act.

The Center is to be organized as a limited liability company owned by physicians specializing in reproductive endocrinology, some of whom are part of a separate group practice, along with Med-Atlantic, Inc., a lab director and possibly other employees of the Center. The physician owners are expected to provide the assisted reproduction physician services at the Center while Med-Atlantic will provide it with comprehensive management services. The assisted reproduction physician services available at the Center will not be limited to only the physician owners but will be available to all physicians specializing in assisted reproduction.

Specifically, the Center will provide in vitro fertilization, other fertility procedures, andrology and endocrine lab tests. There will also be space for embryology and andrology labs as well as endocrine laboratory services.

The Center will bill a global charge for all services provided with the exception of the physician's professional fees and medications. Physicians will establish and bill their own professional fees. Initially, medications will be obtained by patients from independent pharmacies.

It is proposed that the physician owners anticipate seeing patients and performing procedures at the Center at least weekly. There will be space for the physicians to meet and examine their patients and to perform minor procedures. The physicians are to remain involved in the care of their patients who are seen at the Center and are expected to perform the vast majority of physician services for their patients referred (to the Center?).

The physician owners will maintain their existing office practices where they will continue to see patients. Patients who have been referred to the Center may be seen by the physicians at their other office locations.

The physician owners of the Center may refer patients to the Center for assisted reproductive services (endocrine lab tests and andrology studies), which will not be directly performed by the physicians but rather, by employees of the Center. These employees will not be employed by, nor be members of, the referring physician's group practice, but will be generally supervised by the physician owners in the provision of clinical, non-physician services although employed by Med-Atlantic, Inc.

The Center intends to advertise the availability of assisted reproductive services and to engage in the solicitation of patients seeking assisted reproductive services. These patients may be referred to one or more of the physician owners for physician services at either the Center, their individual or group practices, or at other office locations.

The Virginia Practitioner Self-Referral Act, Virginia Code §§ 54.1-2410 through 54.1-2414 (the "Act"), generally prohibits referrals where the practitioner or any of the practitioner's immediate family has an investment interest in a health services entity. Specifically, Virginia Code § 54.1-2411(A) provides that "[u]nless the practitioner directly provides health services within the entity and will be personally involved with the provision of care to the referred patient, . . . a practitioner shall not refer a patient for health services to an entity outside the practitioner's office or group practice. . . ."

Virginia Code § 54.1-2410 contains definitions of the following pertinent terms:

"Investment interest" means the ownership or holding of an equity or debt security, including, but not limited to, shares of stock in a corporation, interests or units of a partnership, bonds, debentures, notes, or other equity or debt instruments, except investment interests in a hospital licensed pursuant to Article 1 (§ 32.1-123 *et seq.*) of Chapter 5 of Title 32.1.

"Practitioner" means any individual certified or licensed by any of the health regulatory boards with the Department of Health Professions, except individuals regulated by the Board of Funeral Directors and Embalmers or the Board of Veterinary Medicine.

"Entity" means any person, partnership, firm, corporation, or other business that delivers health services.

"Referral" means to send or direct a patient for health services to another health care practitioner or entity outside of the referring practitioner's group practice or office practice or to establish a plan of care which requires the provision of any health services outside the referring practitioner's group practice or office practice.

"Group practice" means two or more health care practitioners who are members of the same legally organized partnership, professional corporation, not-for-profit corporation, faculty practice or similar association in which (i) each member provides substantially the full range of services within his licensed or certified scope of practice at the same location as the other members through the use of the organization's office space, facilities, equipment, or personnel; (ii) payments for services received from a member are treated as receipts of the organization; and (iii) the overhead expenses and income from the practice are distributed according to methods previously determined by the members.

"Office practice" means the facility or facilities at which a practitioner, on an ongoing basis, provides or supervises the provision of health services to consumers.

The physician owners of the Center have an investment interest, as that term is defined in Virginia Code § 54.1-2410, in the Center by virtue of the fact that they either individually or by their professional corporation or group practices are members of the entity, the Virginia Fertility Center, L.L.C. As a result, referrals for health care by the physician owners to the Center are prohibited except to the extent that the referral is to a member of the referring physician/practitioner's group or office practice.

Referrals from the physician owners to the Center for assisted reproduction services are permissible provided the practice arrangements may be construed as an "office practice" since the practice arrangement, as submitted, does not qualify as a "group practice" arrangement. To qualify as an "office practice," a physician owner must demonstrate that he provides or supervises the provision of health care "on an ongoing basis" at the Center.

The proposal describes the practice arrangement as the physician seeing patients on at least a weekly basis; with space for the physicians to meet and examine their patients and to perform minor procedures; that the physician is expected to remain involved in the care of their patients who are seen at the Center and are expected to perform the vast majority of physician services for their patients referred. Although the descriptive representations contained in the application reflecting the scope of the physician owners' practices at the Center are not wholly consistent, the proposal appears to satisfy the "on an ongoing basis" requirement of the "office practice" exception contained in the statute.

Since the phrase "on an ongoing basis" is not defined, for purposes of this advisory opinion and in the absence of a statutory definition of the term "on an ongoing basis," the Board adopts an accepted rule of statutory construction wherein common sense should be applied in interpreting words contained in a statute and that the words be given their usual, commonly understood meaning. As there are no reported Virginia court decisions defining the term, a review of court decisions in other states suggests a definition consistent with the concept of services being available on "a continuing, day to day basis," "an exclusive, permanent and full time" basis or a "regular or regularly" scheduled basis.¹

A referral to the Center by a physician owner to another member of his group practice, who performs the service at the Center, satisfies the group practice exception of the statute.

A physician owner referral to the Center for assisted reproductive services, e.g., endocrine lab tests and andrology studies, which expressly are not to be performed by the physicians but rather, by Center employees, who are neither employed by, nor are members of, the referring physician's group practice, may fall within the "office practice" exception provided the physician owner can demonstrate that he "supervises" the provision of health care "on an ongoing basis." Since the physician expressly will not personally perform these services, the physician must therefore "supervise" the provision of the service in order to satisfy the "office practice" exception.

¹ A good example is *Tryc v Michigan Veterans' Facility*, 451 Mich. 129, 545 N.W. 2d 642 (1996 Mich.), a case involving a determination of whether the Veterans' Facility meets the hospital exception contained in the governmental immunity statute. In its consideration, the Court discussed the availability of medical care at the facility on an ongoing basis. It concluded that "an organized program of medical care . . . available on an ongoing basis. . . suggests that physicians are available to provide daily direction or supervision. . . ."

Conclusions of Law

For the reasons set out hereinabove, the Committee shall recommend to the Board of Health Professions, pursuant to 18 VAC 75-20-60(E), that (1) the physician owners have an investment interest, as defined in Virginia Code § 54.1-2410, in the Center by virtue of the fact that that they, either individually or by their professional corporation or group practices, are members of the entity, the Virginia Fertility Center, L.L.C. As such, referrals from the physicians to the Center for physician assisted reproductive services would be permissible provided the physicians, consistent with representations contained in the application, continue to satisfy the "office practice" requirement by practicing at the Center "on an ongoing basis" as interpreted by the Board; (2) referrals to the Center by a physician owner to another member of his group practice, who performs the service at the Center, satisfies the group practice exception of the statute; and (3) referrals for assisted reproductive services which will not be performed by the physicians, *e.g.*, endocrine lab tests and andrology studies, but by employees of the Center who are neither employed by, nor are members of, the referring physician's group practice, may fall within the "office practice" exception, provided the physician owner can demonstrate that he "supervises" the provision of health care "on an ongoing basis."

Alteration, addition or deletion to the documents submitted to the Committee will vacate the advisory opinion given by the Committee and the Board of Health Professions.